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No. 04-1477

Supreme Court, U.S.
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In The

Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS and MARK WILCOX,
Commissioner of State Lands,

Respondents.

On Petition For Writ Of Certiorari To The Arkansas Supreme Court

RESPONDENTS' JOINT RESPONSE BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause of the 14th Amendment require governmental taxing entities to make heroic, extraordinary, additional efforts to locate a taxpayer prior to completing a tax forfeiture sale when notice of the tax forfeiture sale has been repeatedly mailed by certified mail to the last known residence address of taxpayer, which is the address of the real property, which address was provided by the taxpayer, where the taxpayer's spouse resides, and also published notice of the sale, all in accordance with applicable statutory requirements, yet mailed notices are returned by the post office as "unclaimed" with no indication that the taxpayer has moved?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
FACTUAL BACKGROUND	2
PROCEDURAL BACKGROUND	4
ARGUMENT	6
I. THE ALLEGED CONFLICTS IN THE CIRCUITS AND OTHER COURTS ARE ILLUSORY SINCE THE CASES CAN BE RECONCILED EASILY	6
1. Arkansas Supreme Court Properly Stated the Correct Rule of Law	6
2. Petitioner has failed to preserve for review any challenge to Arkansas Code Annotated Section 26-35-705	11
3. Essential Facts Have Been Omitted or Misstated by Petitioner	12
II. THE DECISION BELOW AGREES WITH THIS COURT'S PRECEDENTS, IS FAIR, AND IS RIGHT ON THE MERITS	14
CONCLUSION	17

TABLE OF AUTHORITIES

Page

CASES

Akey v. Clinton County, 375 F.3d 231 (2nd Cir. 2004) 8, 9

Dusenbery v. United States, 534 U.S. 161 (2002) ... 9, 10, 15

Garcia v. Meza, 235 F.3d 287 (7th Cir. 2000) 9

Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1983) 7

Minnesota v. National Tea Co., 309 U.S. 551 (1940) 12

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 6, 9, 15, 16

Plemons v. Gale, 396 F.3d 569 (4th Cir. 2005) 7

Rigsby v. Rigsby, 356 Ark. 311 (2004) 12

STATUTES

Arkansas Code Annotated Section 26-37-202(e) 5

Arkansas Code Annotated Section 26-37-301 ..... 5, 10

Arkansas Code Annotated Section 26-35-705 ..... 11, 12

STATEMENT OF THE CASE

Petitioner Gary K. Jones and his wife, Jean, lost their house in 2003 in a tax forfeiture sale for their failure to pay real property taxes in 1997 and later. Mrs. Jones, living in the house, twice failed and refused to pick up certified mail notices of the tax sale foreclosure proceedings. After the first written notice was returned to the Commissioner of State Lands, the Commissioner purchased a title report, showing Gary K. Jones as the record owner, and showing the real property address as the record address for Mr. Jones. The Commissioner subsequently published notice of the tax auction sale in a statewide newspaper of general circulation in that County. No purchasers came forward, and the property became subject to a negotiated sale. Respondent Linda Flowers made a purchase offer in February, 2003. The Commissioner subsequently conducted additional research into the property. The negotiated sales research indicated that the real property existed as described, remained titled in the name of Gary Jones, had the proper legal and street addresses, and continued to be owned by Mr. Jones. The Commissioner subsequently mailed another notice of the pending negotiated sale to Mr. Jones at the property address where Mrs. Jones lived. This notice was also returned unclaimed. Flowers purchased the property in a negotiated sale, and subsequently moved to evict Mrs. Jones. Mr. Jones sued to have the sale and deed set aside. Flowers counterclaimed. Mr. Jones then added Mrs. Jones as an additional Plaintiff, indicating that she was in possession of the property at the time of the tax sale. The Court granted summary judgment to Flowers and the Commissioner, confirming the sale, and denied the Joneses' motion for summary judgment, dismissing their

case. The Arkansas Supreme Court affirmed, based on multiple attempted actual notices, combined with publication, but (contrary to the assertions of Petitioner) without indicating that this was contrary to "a majority of other courts." Rehearing in the Arkansas Supreme Court was denied.

FACTUAL BACKGROUND

Gary K. Jones and Jean L. Jones, his wife, failed to pay their real estate taxes in 1997, 1998, 1999, and in all future years, so the Pulaski County Collector in 2000 certified their land as delinquent to Defendant Commissioner of State Lands. In March of 2000, Defendant Commissioner provided appropriate written notice, a proposed Petition to Redeem, and instructions, by certified mail, to Petitioner Jones. This notice told of the potential sale of the real property at public auction on or about April 17, 2002, two years in advance, in accordance with the statutory scheme. The March 2000 notice was mailed to the real property address, 717 North Bryan, Little Rock, which is the subject of this Petition, and where Mrs. Jean Jones continued to live through the hearing date in 2004, and which was the notification address of record with Pulaski County. After three attempted deliveries, the written notice was returned "unclaimed" to the Commissioner.

Subsequent to the first written notice, but before the 2002 auction date, and contrary to the assertions of Petitioner in his Petition, the Commissioner of State Lands purchased a title report from Walker Title Abstract Company concerning the parcel of real property at issue. ADD. 79, Record (R.) 94. The title report indicated that

Gary Kent Jones was the record owner of title to the property when it was certified to the Commissioner of State Lands in 2000; confirmed the legal description of the property; confirmed the tax parcel number; disclosed additional non-property tax liens on the real property; indicated that there was no mortgage on the property; indicated that Mr. Gary K. Jones continued to be the record owner of title to the real property on February 14, 2002, as there had been no change in ownership, and further indicated that this was the address of record for the owner. Appellees' Supplemental ADD. 19, R. 103.

On or about April 1, 2002, after the title report, the Commissioner published notice of the sale auction in a state-wide newspaper, which was also the newspaper of record in Pulaski County, with the sale date and redemption information. On the sale date, 4/17/02, no bids were received, thereby subjecting the property to a negotiated sale with the Commissioner.

On or about February 5, 2003, Appellee Flowers submitted an offer to purchase the real property from the Commissioner. After receiving the offer from Flowers, and contrary to the assertions of Petitioner Jones, Respondent Commissioner performed additional research, called "negotiated sales research." ADD. at 80. This involved, among other things, another review of real property records to confirm ownership and address information, a visit to the property to determine whether it still existed as described in the legal description and deed records, and a physical description of the house and the immediate vicinity. Appellees' Supplemental ADD. 26, R. 110.

On February 19, 2003, the Commissioner, by certified mail, sent written notice of a pending negotiated sale to

Gary Kent Jones at 717 N. Bryan Street, Little Rock, the record owner of the real property, at the real property address. As stated before, this was Mr. Jones' last known address. Mrs. Jones, living at the property, again failed and refused to pick up this mail. After three delivery attempts, this notice was subsequently returned to the Commissioner's office marked "unclaimed."

The Commissioner approved Flowers' Offer on April 11, 2003; the Arkansas Attorney General approved Flowers' Offer on April 23, 2003; and the Limited Warranty Deed was issued to Flowers on May 28, 2003.

Mr. Jones has, at various times in this litigation and on appeal, claimed both that the real property at issue is his "homestead" but also claims to have moved out of the home into an apartment. ADD. 48. Nevertheless, Jones failed to file with the Pulaski County Recorder (and Clerk), the Pulaski County Assessor, or the Pulaski County Treasurer, any notice of a change in his address for the mailing of notices of taxes due on the real property. The notices at issue were mailed to Mr. Jones' last known address. Mrs. Jean Jones continued to live in the home on N. Bryan Street, through the hearing date in the trial court in 2004, which is also the same location where Respondent Commissioner repeatedly mailed the notices at issue herein. Mrs. Jean Jones was at all times relevant to this case, the wife of Petitioner Gary K. Jones.

PROCEDURAL BACKGROUND

Petitioner Gary Kent Jones initiated these proceedings by filing a complaint in Circuit Court in Pulaski County, Arkansas, seeking to cancel and set aside Respondent

Commissioner of State Land's Limited Warranty Deed to Respondent Linda K. Flowers concerning certain real property in Pulaski County, Arkansas (717 N. Bryan St., Little Rock), and challenging Arkansas Code Annotated Section 26-37-301 (but no other sections of the Arkansas Code, and without attacking the statutory scheme as a whole). ADD. 1. Jones later added his wife, Jean, as Plaintiff, as well, since she was in possession of the premises at all times relevant to these proceedings. ADD. 19. Both Defendants, Respondents here, denied the claims. Flowers counterclaimed for unlawful detainer, ADD. 8, which Petitioner and his spouse denied.

All parties filed cross-motions for Summary Judgment, as the facts were not disputed. The Trial Court ruled against the Joneses on Arkansas Code Annotated Section 26-37-301, granting Summary Judgment to Respondents Flowers and the Commissioner on their Motions, and denying the Jones' Motion for Summary Judgment and dismissing their Complaint, by Order dated January 14, 2004. The Arkansas Supreme Court subsequently heard the appeal of this matter, involving both Mr. and Mrs. Jones without oral argument. On appeal, the Arkansas Supreme Court unanimously affirmed the judgment of the trial court. Contrary to the assertions of Petitioner, the Arkansas Supreme Court held that strict compliance with the statute (Arkansas Code Annotated Section 26-37-301) is required, but that Due Process does not require the Commissioner to take every extraordinary step possible to guarantee that the written notices arrive in the property owner's hands. Pet. App. 8a. The Arkansas Supreme Court also ruled that Jones failed to preserve for review any challenge to Ark. Code Ann. Sec. 26-37-202(e) (concerning the redemption period). The Joneses' Petition

for Rehearing was also unanimously denied without oral argument. Pet. App. 14a.

ARGUMENT

REASONS FOR DENYING THE PETITION

I. THE ALLEGED CONFLICTS IN THE CIRCUITS AND OTHER COURTS ARE ILLUSORY SINCE THE CASES CAN BE RECONCILED EASILY.

1. Arkansas Supreme Court Properly Stated the Correct Rule of Law.

The question presented is whether the Due Process Clause requires a governmental taxing entity to make heroic, extraordinary efforts to locate a delinquent taxpayer, in addition to those described herein, when notice of a tax forfeiture sale is returned "unclaimed" before taking the property. The Arkansas Supreme Court, concluding a series of cases involving the same issue in a number of different contexts, precisely described the rule of law: No state shall deprive any person of property without due process of law. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Pet. App. 7a (*citing*, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Petitioner erroneously asserts an "entrenched conflict" within the courts concerning the question of notice. This

putative conflict is illusory. The Arkansas line of cases is easily reconciled with the cases cited by Petitioner.

Petitioner relies on *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005) as his most significant case. Yet *Plemons* vacated the trial court's decision in favor of the delinquent taxpayer and remanded. The *Plemons* Court stated that "some follow-up" would be required when initial notice of a tax sale is returned; but such follow-up might simply be an additional attempt to re-send the notice. *Id.* at 576. Impracticable and extended searches, such as consulting a telephone directory, asking tenants in person, or asking a mortgagee bank, "are not required in the name of Due Process." *Id.* at 578. The *Plemons* Court was explicit in stating that it "did not agree that reasonable follow-up compelled such efforts." *Id.* at 577. Policy reasons also dictate this result, as Petitioner's suggested extended searches would impose an undue financial and administrative burden on Respondent Land Commissioner (which would have been paid for by Respondent purchaser, Flowers).

Indeed, the *Plemons* Court cited precisely the same cases as did the Arkansas Supreme Court here: *Mullane*, and *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983). Pet. App. 11a. The Constitution only requires reasonable efforts, given all the circumstances of a particular case, not receipt of actual notice. *Plemons*, 396 F.3d at 577.

Here, there is no question that Respondent Commissioner exceeded the requirements of *Plemons* by taking five separate, discrete steps to notify the taxpayers: (1) initial notice of the sale and right to redeem by certified mail to the record address provided by Pulaski County;

(2) obtaining a title search verifying the property information, ownership, and record address; (3) publishing notice of the sale and right to redeem in a state-wide and county-wide publication; (4) executing a negotiated sales research for record information on ownership and verifying the existence of the house on the real property; and (5) providing a second formal certified mail notice of the pending negotiated sale and right to redeem. *Plemons* did not require these types of steps. Nor did *Plemons* involve a delinquent taxpayer who lived on the real property and simply refused to sign for certified mail, as Mrs. Jones did here.

The second case primarily cited by Petitioner is also in agreement with the rationale and result here. In *Akey v. Clinton County*, 375 F.3d 231 (2nd Cir. 2004), the decision agreed with the Arkansas Supreme Court. It is unnecessary to search the internet, or the telephone book, or voting records, and the like to find a delinquent taxpayer, in order to comply with Due Process requirements. *Akey*, 375 F.3d at 237. The *Akey* Court indicated that a delinquent taxpayer's different real property address, in the same county, would be "of record" and so notice to that address would be required. Yet in the case *sub judice*, that is precisely what the Land Commissioner did: examine title records and other documents in the County real property records to find Mr. Jones. It is not disputed that Mr. Jones rented his separate apartment and so would not have had another address "of record" in the real property records in Pulaski County, Arkansas. Nor is it disputed that Mr. and Mrs. Jones were married and had not filed any divorce or separation papers in any court of record, and so made no formal "record" of their purported "separation." The *Akey* inquiry was whether the state acted

reasonably under all the circumstances, not whether the property owners actually received notice. *Id.* at 235. Respondent Land Commissioner complied fully with the *Akey* requirements and acted both reasonably and constitutionally under all the circumstances.

The third significant case cited by Petitioner also agrees with the result in the instant case. In a personal property forfeiture case, *Garcia v. Meza*, 235 F.3d 287 (7th Cir. 2000), the Seventh Circuit declined to impose an affirmative duty on the government to seek out claimants in each case where the initial notice is returned undelivered, or to require actual notice in every case. *Garcia*, 235 F.3d at 291. Instead, *Garcia* also followed *Mullane*, as did the Arkansas Supreme Court here. *Garcia* specifically involved a single notice of forfeiture, which was returned undeliverable. The remedy in *Garcia* was to require a second attempt at written notice, *id.* at 291, much less than was done by Respondent Commissioner in Mr. Jones' case here.

Many of the other cases cited by Petitioner concern cases decided before *Dusenbery v. United States*, 534 U.S. 161 (2002), and so are no longer applicable. Indeed, Petitioner failed to cite to *Dusenbery* in its Petition, although *Dusenbery* resolves the issue in this case: what notice is required by the Due Process case involving forfeiture of property. Indeed, the Arkansas Supreme Court considered Petitioner's briefs in the Court below dispositive on this issue:

> The very fallacy of the Joneses' argument (concerning efforts to locate a property owner's correct address) is supported by their admission in their brief to this court that due process does not require actual notice before depriving a property

> owner of his property. Citing to *Dusenbery*, the Joneses argue that while actual notice may not be required, such notice must be reasonably calculated to apprise a party of its rights. . . .
>
> Here, there is no dispute that the State attempted to provide the Joneses with notice, both via certified mail and through publication in the newspaper. Accordingly, we cannot say the trial court erred in concluding that the State complied with the provisions of (Ark. Code Ann.) section 26-37-301 and that the tax sale was valid.

Pet. App. 11a.

Dusenbery held that proof of actual receipt of notice is not required by the Due Process clause in a property forfeiture case, and declined to adopt the kind of bright-line rule which Petitioner seeks herein. *Dusenbery*, 534 U.S. 161. While the context involved personal property and the federal Due Process standard in the Fifth Amendment, it is equivalent to the issues herein. *Dusenbery* also resolved many of the precise conflicts cited so fervently by Petitioner herein.

The errors Petitioner asserts herein consist primarily of his assertion that the Arkansas Supreme Court misapplied a properly stated rule of law. In other words, the importance of this case is primarily its importance to Petitioner, but not to the general public. The putative "conflicts" cited by Petitioner in the cases do not have any viable importance for the proper administration of the law.

2. Petitioner has failed to preserve for review any challenge to Arkansas Code Annotated Section 26-35-705.

Petitioner has no right to challenge Section 26-35-705. Arkansas Code Section 26-35-705 provides that the ***taxpayer*** (Jones) has an obligation to furnish the correct address to the taxing authorities in the event that the taxpayer changes address. Ark. Code Ann. Sec. 26-35-705. In a 1993 amendment to this code section, tax notices are sent "to the address provided by the taxpayer." Ark. Code Ann. Sec. 26-35-705. There is no dispute that the notices in this matter were mailed to the address provided by the taxpayers, Mr. and Mrs. Jones. There is no dispute that Respondent Land Commissioner, like the Arkansas Supreme Court, relied upon the requirements of Section 26-35-705, since Petitioner did not challenge the application of this law in any way in any court below.

Petitioner now attempts to attack Section 26-35-705 by stating that the Arkansas Supreme Court "rejects" the "majority" approach for obtaining additional information about a delinquent taxpayer's mailing address. Contrary to Petitioner's assertions, this is not what the Arkansas Supreme Court said because the Joneses did not challenge this law in the courts below. The Joneses argued below that the Commissioner should be required to search voting records or phone books in order to ascertain the property owner's correct address. Pet. App. 10a. As the Arkansas Supreme Court said, the Joneses' argument "ignored the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address." Pet. App. 10a. The Joneses ***ignored*** the applicable law, did not challenge it in any way, and certainly did not make any record of a challenge to Sec. 26-35-705 in any way in any of the courts below.

The constitutionality of Section 26-35-705 was not an issue at all in the trial court, was not briefed by Petitioner in the Arkansas Supreme Court, indeed, was not even cited by Petitioner in his three briefs to the Arkansas Supreme Court. There is no ruling in the courts below concerning Ark. Code Ann. Sec. 26-35-705. There is no record developed on the issue of the constitutionality of Sec. 26-35-705. Accordingly, the issue of the constitutionality of Section 26-35-705 is not preserved for review in the United States Supreme Court, because it was not preserved for review in the Arkansas Supreme Court. *See, e.g., Rigsby v. Rigsby*, 356 Ark. 311 (2004); Pet. App. 4a. Certiorari should be denied, and all review precluded, where there is an adequate basis in state law to decide the issue – Joneses' procedural default. Jones has done nothing at all to challenge that state law (Ark. Code Ann. Sec. 26-35-705) prior to raising the issue in his petition for certiorari, and so cannot challenge it now. *Minnesota v. National Tea Co.*, 309 U.S. 551 (1940).

3. Essential Facts Have Been Omitted or Misstated by Petitioner.

Petitioner here has failed to provide the Court with a complete description of the activities undertaken by the Commissioner prior to the sale. Over and over, Petitioner states that "the State made no effort to locate Mr. Jones before selling his house" Pet. 2; and "made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale." Pet. 4. These statements are false.

The Commissioner did make additional efforts to locate Mr. Jones, including conducting a title search prior

to publication ir. 2002, Appellees' Supp. ADD. 19; and conducting "negotiated sales research" prior to the final sale, Appellees' Supp. ADD. 26. The Commissioner also published notice in the state-wide newspaper, which was also a newspaper of general circulation in Pulaski County, where Petitioner and his wife both live. Note, additionally, that the statutory scheme in Arkansas, and the facts as developed in this case, required that these steps (including two separate certified mail notices) take place over a period of three years, from February of 2000 to May of 2003, in order to give the taxpayers ample time to correct any administrative errors, oversights, or temporary inability to pay. There was no "rush to judgment" in this case, unlike so many of the cases cited by Petitioner in his Petition.

Petitioner's erroneous argument that the Commissioner should have been required to look for additional addresses for Gary Jones wrongly assumes that the Commissioner knew that Mr. Jones did not reside at 717 N. Bryan Street. But nothing in the records provided to the Commissioner indicated Mr. Jones did not live there. The certified mail was returned "unclaimed" but did not indicate that a forwarding order had expired, or that Mr. Jones did not occupy the property. Petitioner Jones made no record, in the courts below, of any official change of address, or any notification to the taxing authorities, or any other indication in real estate records that would indicate Mr. Jones (but not Mrs. Jones) had moved out of the real property at N. Bryan Street.

Petitioner also omits from his Petition the facts he intentionally added in the trial court: that he remained married to his wife during all this time; that she continued to occupy the real property on North Bryan at all times

relevant to this case; that she became a Defendant, Counter-claimant, and Appellant in the case at his behest; and that Mrs. Jones, his wife, is the person who failed to claim the certified mail sent repeatedly to the real property address at 717 N. Bryan where Mrs. Jones continued to live all through these years (1997 to 2004). Mrs. Jones is no longer a part of these proceedings, but she was involved even in the Arkansas Supreme Court. Pet. App. 1a.

These essential facts change the nature of the legal issues before the Court. The real property records in Pulaski County could not have yielded any other information in this matter, no matter how hard Respondent Land Commissioner searched, and no matter now much money Respondent Land Commissioner spent, because Petitioner and his spouse left all of those records intact as a result of Mrs. Jones' continued occupancy of the house on N. Bryan. It is not the Land Commissioner's failures that led to the forfeiture of Petitioner's real property; instead, it was deliberate ignorance, or steadfast indifference, to significant legal events, by one of the primary parties – and the occupant of the land – in the courts below. Mrs. Jones' judicious decision not to pursue this matter any further should not be construed to permit Mr. Jones to make spurious arguments that he could not possibly have made successfully in the Courts below.

II. THE DECISION BELOW AGREES WITH THIS COURT'S PRECEDENTS, IS FAIR, AND IS RIGHT ON THE MERITS.

Certiorari should be denied because the Court's decision below is the right result under the particular facts and circumstances of this case. A well-respected Court has

unanimously concluded that the trial court's judgment should be affirmed. There is no violation of Petitioner's right to due process under the 14th Amendment. A case by case analysis, applying the appropriate standard, continues to be, and should continue to be, the applicable law. Petitioner would have this Court replace more than twenty years of jurisprudence on this subject, with a bright-line rule requiring a much higher level of searching for a delinquent taxpayer than any court has ever imposed under this Court's applicable Due Process rulings.

Petitioner agrees with the Arkansas Supreme Court on the applicable case precedent, as least as far as *Mullane* is concerned. Indeed, Petitioner, Pet. App. 13, quotes *Mullane* in a fashion nearly identical to the quotation from the Arkansas Supreme Court decision herein. Pet. App. 7a.

Petitioner now fails to identify *Dusenbery*, 534 U.S. 161, as an applicable case, although he cited to it in the courts below. The United States Constitution does not require that actual notice of a right to redeem be received in order to comply with Due Process. *Dusenbery v. United States*, 534 U.S. 161 (2002). Under *Dusenbery*, in order to comply with federal Due Process requirements, the government need only make good faith attempts to provide actual notice by following statutory procedures, but does not have to guarantee receipt of actual notice, above and beyond statutory requirements ***which were not challenged in the courts below***.

The holding in *Dusenbery*, in accordance with applicable case precedents also cited herein, indicates that reasonable good faith attempts to locate the address for the delinquent taxpayer are sufficient, even if unsuccessful. The Land Commissioner's five-step attempts to notify

Mr. and Mrs. Jones here, over the course of several years, comport fully with Due Process. Mr. and Mrs. Jones received all of the process that they were due, under the circumstances.

Petitioner concludes by stating that the Land Commissioner could have ascertained Petitioner's address by consulting telephone directories, voter registration records, or state income tax rolls. Petitioner further states that such a search is mandated by *Mullane* and its progeny. But Petitioner does not cite a single case where these types of searches are required in real property tax forfeiture cases. To the contrary, cases cited by Petitioner uniformly hold the opposite, as set forth in Section I. A, above.

Petitioner reaches his wrong result by misconstruing the facts of the case and by repeating, over and over, that the Land Commissioner did nothing more than mail notice to Petitioner Jones twice. The Land Commissioner's separate searches of real property records, publication in the newspaper, and sequencing of those events, over the course of three years, comports fully with due process. In light of Mrs. Jones' con[illegible]ed occupancy of the house on N. Bryan during the entire time, nothing more should be required.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Respondents:

Mark Wilcox, Commissioner of State Lands, in his official capacity

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PETITIONER'S REPLY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PETITIONER'S REPLY 1

1. Respondents Ignore All But Three Of The Cases That Comprise The Split Among The Courts And Either Misstate Or Fail To Grasp The Import Of The Cases They Discuss. 1

2. *Dusenbery* Is Inapposite Because Mr. Jones Does Not Claim That Due Process Requires Actual Notice And *Dusenbery* Did Not Address The Question Presented Here. 5

3. Mr. Jones Does Not Challenge Section 26-35-705; Thus, Respondents' Claim That Such A Challenge Was Not Preserved For Review Is Irrelevant. 6

4. The Petition Does Not Omit Or Misstate Any Essential Fact, And Respondents' Assertion That The Decision Below Is Right On The Merits Underscores The Need For Review. 7

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Akey v. Clinton County,
375 F.3d 231 (2d Cir. 2004) 4

Dusenbery v. United States,
534 U.S. 161 (2002) 5

Garcia v. Meza,
235 F.3d 287 (7th Cir. 2000) 4

Hamilton v. Renewed Hope, Inc.,
589 S.E.2d 81 (Ga. 2003) 3, 6

Kennedy v. Mossafa,
789 N.E.2d 607 (N.Y. 2003) 4

Plemons v. Gale,
396 F.3d 569 (4th Cir. 2005) 1, 2, 3, 4, 6

Rosenberg v. Smidt,
727 P.2d 778 (Alaska 1986) 3

PETITIONER'S REPLY

This case presents the question whether, when mailed notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to make any additional effort to locate the owner before taking the owner's property. The Brief in Opposition (BIO) provides no basis to deny certiorari.

1. Respondents Ignore All But Three Of The Cases That Comprise The Split Among The Courts And Either Misstate Or Fail To Grasp The Import Of The Cases They Discuss.

Respondents assert that the entrenched conflict among the courts that have addressed the question presented is "illusory" and that "[t]he Arkansas line of cases is easily reconciled with the cases cited by Petitioner." BIO 7. But the BIO ignores 30 of the 33 cases cited in the petition as examples of the deep and intractable conflict. In the tax sale context, the petition cites decisions of fourteen different courts on the majority side of the split, Pet. 6-7 & n.5-6, six courts other than Arkansas courts on the minority side, Pet. 8 n.7, and two courts that have taken an intermediate approach, Pet. 9 n.8. In the context of forfeitures for reasons other than delinquent taxes, the petition cites eight decisions on the majority side, Pet. 10 n.9, and three that reject the majority rule, Pet. 10-11.

Moreover, of the three cases respondents discuss, they misstate two and fail to grasp the import of the third. First, respondents err by asserting that the decision below can be reconciled with *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005). BIO 7. *Plemons* held that "when prompt return of an initial mailing makes clear that the original effort at notice has failed, the party charged with notice must make reasonable efforts to learn the correct address before constructive notice will be deemed sufficient." 396 F.3d at 576. The court below held that

due process does *not* require "that the State must try to locate the correct address of a delinquent taxpayer when a notice is returned unclaimed." Pet. App. 6a. Thus, the decision below directly conflicts with *Plemons* and the decisions of the courts following the majority rule, *see* Pet. 6-7 & n.5-6, but it is consistent with the approach taken by courts in several other states. *See* Pet. 8 n.7.

Respondents attempt to explain away the conflict with *Plemons* by claiming that the State here did enough to satisfy *Plemons* by sending two certified letters that were returned unclaimed, performing a title search and negotiated sale research, and providing constructive notice by publication. BIO 7-8. These acts are insufficient to satisfy the due process requirements articulated in *Plemons*. The return of the certified letters triggered the State's obligation to "make reasonable efforts to learn [Mr. Jones's] correct address before constructive notice will be deemed sufficient." 396 F.3d at 576. The State's other actions were not efforts to learn Mr. Jones's correct address. The title search confirmed that Mr. Jones owned the property, but did not shed any light on his correct mailing address.[1] The negotiated sales research verified the existence of the house, but was not calculated to discover Mr. Jones's correct address. Publication is a means of providing constructive notice, not a means to ascertain a correct address,

---

[1]Although respondents claim that the State "examine[d] title records and other documents in the County real property records to find Mr. Jones," BIO 8, no evidence suggests that, while conducting a title search to identify those with an interest in the property to be sold, the State sought to determine Mr. Jones's correct address by examining records relating to any other property.

and is constitutionally sufficient only after reasonable efforts to learn the correct address have failed.

Respondents further err by claiming that *Plemons* held that consulting a telephone directory or making inquiry with the occupants of a property are "impracticable and extended searches" not required by due process. BIO 7. *Plemons* held only that those techniques were not compelled in that case, because the record showed that the telephone directory would not have yielded the correct address, and because contacting the tenants at the property was not likely to be successful after notices sent to "Occupant" at the property's mailing address had been returned as undeliverable. 396 F.3d at 577. But *Plemons* acknowledged that "checking the local telephone directory may be reasonable in a given situation." *Id.; accord Hamilton v. Renewed Hope, Inc.*, 589 S.E.2d 81, 85 (Ga. 2003); *Rosenberg v. Smidt*, 727 P.2d 778, 780 (Alaska 1986). In this case, it is undisputed that reference to the local telephone directory would have yielded Mr. Jones's correct address. ADD 48-49. Similarly, contacting the occupants of the property at issue here would not have imposed an unreasonable burden because State personnel visited the property as part of the negotiated sale research. SUPP ADD 26. Contacting the occupants would have yielded Mr. Jones's correct mailing address, and leaving a notice at the house would have apprised Mr. Jones of the pendency of the sale.[2] Significantly, the BIO does not mention *Plemons'* admonition that "it is, at the very least, reasonable to require examination (or re-examination) of all available public

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[2]Indeed, the unlawful detainer notice posted on the door of the property *after* the 30-day post-sale redemption period had passed was discovered by the occupants of the house who then contacted Mr. Jones, providing him his first actual notice of the sale of his home. Pet. App. 2a-3a, ADD 1, 11.

records when initial mailings have been promptly returned as undeliverable." 396 F.3d at 577. In this case, the State could have located Mr. Jones's correct address by consulting publicly available voter registration rolls or state income tax records.

Respondents also wrongly assert that the decision below is consistent with *Akey v. Clinton County*, 375 F.3d 231 (2d Cir. 2004). BIO 8-9. *Akey* held that when a foreclosure notice sent to an outdated address was returned undeliverable, due process required a reasonably diligent search for the correct address, and that an inclusive search of the public record would suffice. 375 F.3d at 237. In this case the government could have located Mr. Jones's correct address by consulting public records, but the State failed to make further efforts to find Mr. Jones's correct address following return of the two certified letters. *Akey* held that such efforts are required by due process; the court below held the opposite.[3]

Respondents are correct that *Garcia v. Meza*, 235 F.3d 287, 291 (7th Cir. 2000), "decline[d] to impose an affirmative duty upon the government to seek out claimants in each case where its initial notice is returned undelivered." *See* BIO 9.

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[3] *Akey*, 375 F.3d at 237, noted the statement in *Kennedy v. Mossafa*, 789 N.E.2d 607, 612 (N.Y. 2003), that the "reasonable search of the public record" required after a notice is returned undeliverable "does not necessarily require searching the Internet, voting records, motor vehicle records, the telephone book or other similar resource[s]." But *Kennedy* also held that "[t]he public record does not consist solely of the tax roll." *Id.* at 611. At any rate, because *Akey* and *Kennedy* require a reasonably diligent search for the taxpayer's correct address after initial notice is returned, both cases conflict with the decision below.

That some federal circuits reject the majority rule only emphasizes the need for this Court to resolve the split.

2. *Dusenbery* Is Inapposite Because Mr. Jones Does Not Claim That Due Process Requires Actual Notice And *Dusenbery* Did Not Address The Question Presented Here.

Respondents err by claiming that "*Dusenbery* resolves this case." BIO 9 (citing *Dusenbery v. United States*, 534 U.S. 161 (2002)). *Dusenbery* simply rejected the notion that *actual notice* is required while reaffirming the rule that the government's efforts must be reasonably calculated under all the circumstances to apprise the interested party of the pendency of the forfeiture. 534 U.S. at 170 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Thus, *Dusenbery* would be dispositive only if Mr. Jones claimed that due process requires actual notice before property may be taken. That is not his position, as even respondents concede. *See* BIO 9 (quoting Pet. App. 11a (noting Mr. Jones's view that "due process does not require actual notice")). Rather, Mr. Jones maintains that when mailed notice of a tax sale or property forfeiture is returned undelivered, due process requires the government to take further reasonable steps to locate the owner before taking the property.

In *Dusenbery*, the government's notice was sent by certified mail and was actually received at the institution where Mr. Dusenbery was incarcerated. 534 U.S. at 164-65. The Court would have addressed the issue presented here only if the notice mailed to Mr. Dusenbery had been returned undelivered, thus informing the government that its attempt to give notice had failed. Because *Dusenbery* did not address the question presented, the deep split in authority presented by this case remains unresolved.

Indeed, the Fourth Circuit in *Plemons* and the Georgia Supreme Court in *Hamilton* have specifically recognized that *Dusenbery* does not answer the question presented. *Hamilton* criticized the trial court for improperly relying on *Dusenbery* as support for the conclusion that due process requires no more than a search of tax and deed records before resorting to publication. As *Hamilton* explained, "the Supreme Court [in *Dusenbery*] was only reaffirming the principle, drawn from *Mullane* . . . , that an interested party is entitled to notice which is reasonably calculated, under all of the circumstances, to apprise him of the pendency of a tax sale. The Supreme Court did not alter the current constitutional standard, which is that the notice must be sent to those interested parties whose names and addresses are ascertainable by 'reasonably diligent efforts.'" 589 S.E.2d at 84 (citations omitted). *Plemons* similarly explained the holding in *Dusenbery*: "[A]lthough the Constitution does not always require actual receipt of notice, it does always require efforts 'reasonably calculated under all the circumstances to apprise' a party 'of the pendency' of the deprivation of property." 396 F.3d at 573 (quoting *Dusenbery*, 534 U.S. at 168-71).

3. Mr. Jones Does Not Challenge Section 26-35-705; Thus, Respondents' Claim That Such A Challenge Was Not Preserved For Review Is Irrelevant.

Respondents assert that "Petitioner has no right to challenge [Ark. Code Ann.] Section 26-35-705," BIO 11, a statute requiring taxpayers to notify the taxing authorities of a change of address. Mr. Jones does not challenge that statute. Thus, respondents' discussion of whether "the issue of the constitutionality of Section 26-35-705 [has been] preserved for review" is inapposite. BIO 12. The only reference to Section 26-35-705 in the petition is the observation that any failure by

a taxpayer to comply with a state statute requiring notice of a change of address cannot relieve the State of its due process obligations under the Fourteenth Amendment, and that the failure of the Arkansas Supreme Court to adhere to this principle provides a further reason to grant certiorari. *See* Pet. 14-15 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 799 (1983) ("a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation" to provide notice)).

4. The Petition Does Not Omit Or Misstate Any Essential Fact, And Respondents' Assertion That The Decision Below Is Right On The Merits Underscores The Need For Review.

Respondents maintain that Mr. Jones received due process and attempt to recast the issue as whether the Fourteenth Amendment requires "every extraordinary step possible to guarantee that the written notices arrive in the property owner's hands," BIO 5, "heroic, extraordinary efforts," BIO 6, and a "higher level of searching . . . than any court has ever imposed." BIO 15. Respondents' hyperbole notwithstanding, this case presents an excellent vehicle for the Court to apply the *Mullane* standard to circumstances where the government knows that its initial efforts to notify a property owner of an impending sale have failed.

Respondents contend that the petition falsely "states that 'the State made no effort to locate Mr. Jones before selling his house' Pet. 2; and 'made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale.' Pet. 4." BIO 12. Respondents are wrong.

First, respondents have selectively quoted from the petition in a manner that omits important qualifying language. On page 2, the petition states:

> The State sent two notices to Mr. Jones by certified mail, but both were returned unclaimed. Although the State knew that its attempts to provide notice had been ineffective, and although Mr. Jones's correct mailing address was readily available from a variety of sources, the State made no effort to locate Mr. Jones before selling his house.

On page 4, the petition states:

> Although the State knew that Mr. Jones had not received the two notices it sent by mail, the State made no effort to ascertain the correct mailing address for Mr. Jones or to provide effective notice of the impending sale, even though Mr. Jones's proper address could have been discovered with minimal effort. Moreover, State personnel apparently visited the Bryan Street property and viewed the house as part of the negotiated sale process, but the State did not post a notice at the house.

When read as a whole, both of these passages assert that the State made no *further* effort to locate Mr. Jones's correct mailing address *after* the mailed notices were returned.

Second, respondents suggest that the State took two steps to ascertain Mr. Jones's correct address: performing a title search and conducting negotiated sale research. BIO 12-13. As discussed on page 2 above, there is no evidence that either of these tasks was part of an effort to ascertain Mr. Jones's correct mailing address once the State knew that its attempts to provide notice by mail had failed.

Respondents argue that Mr. Jones "wrongly assumes" that the State knew he had moved from the Bryan Street house. BIO 13. That Mr. Jones had moved is irrelevant. The record shows that the State knew that its mailed notices had not been received, and that is what triggered the State's constitutional obligation to take further reasonable steps to locate Mr. Jones before taking his property. Similarly, respondents spill much ink blaming Mr. Jones's estranged wife for not claiming the two certified letters, even though she was not the record owner of the property and the letters were addressed to Mr. Jones alone. Blaming Mr. Jones's estranged wife for not claiming letters addressed to someone else does not negate the undisputed fact that the State could have located Mr. Jones's correct address with minimal effort. And like respondents' other efforts at obfuscation, it does nothing to diminish the need for this Court to resolve the deep division among the federal and state courts and provide much-needed certainty for state and local authorities, property owners, and purchasers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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